Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

ISHMAEL NWANGWA,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Marina Tramontozzi*
1330 New Hampshire Ave
Washington, DC 20036
202-393-4141

William B. Thompson
P.O. Box 584
Wheaton, IL 60189
630/690-1971

**Counsel of Record*

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

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QUESTIONS PRESENTED

1. Can the Seventh Circuit Court of Appeals ignore the U. S. Supreme Court's clear statement of the law under Federal Rule of Civil Procedure 56 set forth in Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990).

2. Can the Seventh Circuit Court of Appeals act like a jury and weigh Plaintiff's sworn evidence of direct race discrimination under Federal Rule of Civil Procedure 56 so as to grant Defendant's motion for summary judgment?

3. Can the Seventh Circuit Court of Appeals require a Plaintiff to produce more than Plaintiff's sworn averment of specific facts essential to his case in opposition to a motion for summary judgment to survive the motion?

4. Is the rule of law on Federal Rule of Civil Procedure 56 as stated in Lujan v. National Wildlife Federation, 497 U. S. 871, 888 (1990) overruled?

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Ishmael Nwangwa, Petitioner, by the undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

This is a civil rights race, gender, age and retaliation discrimination case brought before the United States District Court for the Northern District of Illinois where the Court (Norgle J.) granted Fed Ex's motion for summary judgment under Federal Rule of Civil Procedure 56 on December 20, 2001.

Plaintiff timely appealed to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court on February 3, 2003 and denied Plaintiff's petition for rehearing and rehearing en banc on March 3, 2003.

JURISDICTION

Subject matter jurisdiction for the United States District Court for the Northern District of Illinois is found in 42 U.S.C. § 2000e et seq., 42 U.S.C. § 1981 and 29 U.S.C. § 626 et seq.

Subject matter jurisdiction for the Court of Appeals for the Seventh Circuit was invoked through 28 U.S.C. § 1291.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS INVOLVED

Civil Rights Act of 1964 and 1991, 42 U.S.C. § 2000e et seq.
and § 1981
Age Discrimination in Employment Act, 29 U.S.C. § 626 et seq.
Federal Rule of Civil Procedure 56

STATEMENT OF THE CASE

Plaintiff Ishmael Nwangwa ("Mr. Nwangwa") came to the USA from Nigeria many years ago, secured a "green card" and in 1993 began working for Federal Express in the Chicago area. In 1997 he got a new white boss who, until he fired Mr. Nwangwa in 1999, regularly made negative racial statements to Mr. Nwangwa, who testified during his deposition to the following episodes from his EEOC Charge of Discrimination:

In December 1998 Appellant's new boss called him "little Nigerian" in front of several other Fed Ex employees, and when Mr Nwangwa complained the Boss told him that this is America and if he didn't like the way things are said and done then he was welcome to go back to his neck of the woods in Nigeria. As Mr Nwangwa entered the Fed Ex building the Boss and the other employees laughed at him.

There was a Fed Ex company luncheon at which the Boss asked Mr Nwangwa what kind of wild animals his people used for meatballs in Nigeria. When he complained about the Boss' racial jokes, the Boss told him to go back to Nigeria if he didn't like the racial jokes.

There was a meeting in the Boss' office where boss yells at Mr Nwangwa that he can complain all he wants but he can go back to Nigeria if he thinks things are bad for him here, and for sure Boss is not done with him yet and he should not plan a retirement party at Fed Ex.

Mr Nwangwa testified to an episode in June 1999 when he complains to Boss that he isn't allowed to be one of the managers representing their Station at District meetings. Boss states that a) he is only going to send managers who will present a positive image of the station, b) this is no place for affirmative action and c) Mr Nwangwa, being black, may not even be understood at the meetings.

Mr Nwangwa describes a February 1999 staff meeting where the Boss was starting one of his regular routines of making fun of how black people speak and the Boss stated that an applicant reminded him of the people at 63rd and Green Streets in Chicago but they could be more easily understood than Mr. Nwangwa. The Boss accepted without criticism a co-manager's suggestion that the hiring manager make up something to prevent a black applicant from being hired. After this

meeting, Mr Nwangwa contacted the Human Resources representative, Ms Stacey Buehner, to complain but she dismissed Mr Nwangwa's complaints as a joke.

Mr Nwangwa recites the bizarre episode in April 1999 of his requesting a promotion to the day shift and the Boss telling him that maybe former Los Angeles Dodger official Al Campanis was right that "blacks don't have what it takes" for management positions, and that Mr Nwangwa would not get the job-promotion. The Boss then went on to say that Mr Nwangwa's former manager's review was an affirmative action give-away and the Boss intended for his poor reviews to jeopardize Mr Nwangwa's promotion chances at Fed Ex.

Next Mr Nwangwa describes an April 1999 meeting with the HR Rep. Ms Buehner and the Boss' boss Mr. Meilinger in which Mr Nwangwa specifically stated that other managers did not get the harsh treatment from the Boss which he got, and Meilinger refused to investigate or do anything.

He then explains that after the meeting described above, the Boss stated that even though Mr Nwangwa said he talked to Meilinger and Buehner because of unfairness and discrimination in Boss' treatment of him, Boss said it would now only be a matter of time before 'the other shoe drops.'

Next Mr Nwangwa testified that the Boss promised to 'tag one more performance reminder' on him so he would 'be history'.

Mr Nwangwa then describes how a co-manager referred to him in March 1999 as "the little African", without any apparent discipline or criticism from the Boss.

Mr Nwangwa then testifies about an April 1999 episode in the Boss' office at Fed Ex during which the Boss repeatedly called him a "Black Manger" and another subordinate a "black employee", in spite of Mr

Nwangwa's complaints during this meeting that white managers aren't treated this way.

Next he recites an April 1999 event when the Boss gave a serious "performance reminder" to him for failing to fill open-positions even though the Boss had actual knowledge that Mr Nwangwa had filled his positions and that other, white managers had 'open positions' and were not written up via "performance reminders".

Next is a description of the Boss giving Appellant a 'counseling letter' discipline for an error regarding packages which was in fact committed by a white manager and the Boss had actual knowledge of it. Appellant complained of this discrimination to Boss to no avail.

Mr Nwangwa states that in August 1999 the Boss issued another disciplinary 'counseling letter' for a late-road-test even though the Boss had actual knowledge that a) Mr Nwangwa had done his test timely and b) a female employee named Karen Savino had not, but was not disciplined.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's opinion simply ignores the Lujan v. National Wildlife Federation 497 U. S. 871, 888 (1990) precedent because that Court weighs the quality of Mr Nwangwa's evidence that the Boss made these racially charged statements and that Mr Nwangwa complained to the Boss about this discriminatory treatment. This Court ruled that the purpose of Federal Rule of Civil Procedure 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues; in ruling on a Rule 56 motion, a

District Court must resolve any factual issues of controversy in favor of the non-moving party only in the sense that where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. If Lujan is to be followed properly, once Appellant "avers" under oath that certain discriminatory, specific factual events happened, it becomes a jury question and summary judgment must be denied.

Respectfully, according to the Lujan ruling, Mr Nwangwa does not need to do more than give his sworn testimony as to these specific facts to survive summary judgment. Anything else, such as is discussed by the District Court and the Seventh Circuit, is impermissibly weighing the quality of the evidence and deciding whether or not to believe Appellant at the summary judgment stage. This is reversible error and the Supreme Court should grant the writ.

As a public policy matter, the anti-discrimination laws are not so much about race, age and sex as about "power". See *The New York Times Magazine*, March 9, 2003, p. 80, comments of Honorable Roger L. Gregory, Judge of the Circuit Court of Appeals for the Fourth Circuit.

If Mr Nwangwa's Boss had said these discriminatory statements in a non-master-servant setting, he'd have been lucky not to have been punched in the nose, or worse; but it was the circumstance of the boss-subordinate setting which gave Boss the 'power' to force Mr Nwangwa to endure these awful statements, go through Fed Ex channels and still lose his job.

Similarly, the Lujan ruling on Rule 56 is about 'power', i.e., the power of federal district courts to require non-movants to swear/aver specific facts essential to the elements of their case before continuing the litigation process. Once Mr Nwangwa as the non-

movant so avers, the court must use its 'power' - - - the summary judgment process is denied and ended; the court can't require more of the non-movant than Rule 56 and this Court have set forth and ruled.

CONCLUSION

Mr Nwangwa has met the requirements of Rule 56 by respectfully showing that the Seventh Circuit didn't follow Supreme Court precedent of the Lujan case by going past Appellant's sworn averments of specific facts essential to his case and 'playing - jury' to weigh the evidence. Therefore, Petitioner Ishmael Nwangwa requests of this Court that it GRANT his Petition for a writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

RESPECTFULLY SUBMITTED,

Marina Tramontozzi*
1330 New Hampshire Ave
Washington, DC 20036
202-393-4141

(Any footnotes trail the end of each document.)
No. 02-1142

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ISHMAEL NWANGWA,
Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellee.

January 28, 2003, Argued
February 3, 2003, Decided

COUNSEL: For ISHMAEL NWANGWA, Plaintiff - Appellant: William B. Thompson, Wheaton, IL USA.

For FEDERAL EXPRESS CORPORATION, Defendant - Appellee: Colby S. Morgan, Jr., FEDERAL EXPRESS CORPORATION, Memphis, TN USA.

For FEDERAL EXPRESS CORPORATION, Defendant - Appellee: Martin K. LaPointe, BURKE, WARREN, MACKAY & SERRITELLA, Chicago, IL.

JUDGES: Before Hon. ILANA DIAMOND ROVNER, Circuit Judge. Hon. TERENCE T. EVANS, Circuit Judge. Hon. ANN CLAIRE WILLIAMS, Circuit Judge.

OPINION: ORDER

Ishmael Nwangwa sued Federal Express Corporation ("FedEx"), alleging that it violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, et seq., and the Age

Discrimination in Employment Act, 29 U.S.C. § 626, et seq., when it terminated him based on his race, gender, and age, and in retaliation for his complaints of discrimination. The district court granted summary judgment in favor of FedEx, and we affirm.

Nwangwa, a Nigerian male over the age of 40, began working for FedEx as a handler (someone who loads packages onto trailers) in 1993. In January 1997 he became an operations manager in FedEx's Northbrook facility, a position that required him to manage hourly employees. James Fruhauf became the facility's senior manager (and Nwangwa's direct supervisor) in November 1997, and Paul Meilinger, a managing director, supervised Fruhauf.

FedEx has a written policy outlining various disciplinary options available to managers. Managers can issue, for instance, a "performance reminder" or disciplinary notice to an employee who has major performance problems. When an employee receives three performance reminders in a twelve-month period, FedEx policy requires that the employee be terminated. Disciplined employees may appeal their performance reminders.

In less than one year, Nwanga received three performance reminders. Fruhauf issued Nwangwa his first performance reminder on January 14, 1999, for failing to timely record two employees' injuries in FedEx's database. On April 15, 1999, Fruhauf issued Nwangwa his second performance reminder for not timely filling open routes (routes without a full-time driver) and acting as a driver in order to cover the routes. Nwangwa received his third performance reminder on September 20, 1999, for four missed package pick-ups from customers.

FedEx immediately terminated Nwangwa because the September Reminder marked his third such reminder in a year. Nwangwa appealed his termination using FedEx's grievance process. In his grievance, Nwangwa claimed that Fruhauf issued the performance reminders because of a discriminatory motive or in retaliation for complaints he had previously made to Fruhauf and Meilinger about Fruhauf's use of racist language. After referring the matter to its EEO department for investigation, FedEx upheld the termination decision. Nwangwa received a right-to-sue letter from the EEOC and then filed this suit in federal district court.

In his complaint, Nwangwa alleged that Fruhauf repeatedly used discriminatory language that demonstrated his racial animus. Nwangwa alleged, for instance, that Fruhauf (1) called him "little Nigerian"; (2) compared an African-American employee's speech to that of individuals on the corner of 63rd Street and Green Street in Chicago, commenting that the individuals on 63rd and Green were easier to understand than the employee; (3) asked Nwangwa during a lunch meeting whether pizza existed in Nigeria and what wild animal were used for meatballs; (4) commented that Nwangwa's prior supervisors inflated his performance reviews because of affirmative action goals; and (5) told Nwangwa to return to Nigeria if he did not like Fruhauf's management style.

Nwangwa also alleged that Fruhauf retaliated against him for complaints he had made to Fruhauf and Meilinger about Fruhauf's "inappropriate language." According to Nwangwa, Fruhauf issued the April Reminder three days after Nwangwa objected to Fruhauf calling him the "Black Manager" and an African-American employee the "Black Employee." Further, Nwangwa alleged that after he appealed the April

Reminder, claiming that Fruhauf was discriminating against him, Fruhauf told him that his days at FedEx were numbered. Finally, Nwangwa claimed that Fruhauf threatened his job on another instance in August 1999, when he stated that "he wasn't done with [Nwangwa]."

The district court granted summary judgment to FedEx because Nwangwa presented no evidence to support his claims. On the race, gender, and age claims, the district court assumed that Nwangwa provided evidence to support a prima facie case, but went on to conclude that Nwangwa failed to demonstrate that FedEx's reason for terminating him was pretextual because Nwangwa admitted the facts underlying the January and September Reminders and offered no evidence to rebut the facts underlying the April Reminder. On the retaliation claim, the court concluded that Nwangwa's general complaints about discrimination did not constitute evidence that he engaged in protected conduct, and that even if he did engage in protected conduct, Nwangwa did not provide evidence that the complaints caused his termination.

On appeal Nwangwa argues that the district court erred in entering summary judgment because he "raised material fact questions about each alleged performance deficiency." This court reviews a grant of summary judgment de novo and views the facts in the light most favorable to the non-moving party. O'Neal v. City of New Albany, 293 F.3d 998, 1003 (7th Cir. 2002).

Nwangwa did not present direct evidence of discrimination based on race, gender, or age, so he must proceed under the indirect evidence method. Under the familiar McDonnell-Douglas test, he must establish that (1) he was a member of a protected class; (2) he was meeting FedEx's legitimate expectations; (3) he suffered

an adverse employment action; and (4) similarly situated individuals, not members of the protected class, were treated more favorably. See Grayson v. O'Neill, 308 F.3d 808, 817-18 (7th Cir. 2002) (applying the test to a race claim); Mateu-Anderegg v. Sch. Dist. of Whitefish Bay, 304 F.3d 618, 625 (7th Cir. 2002) (applying the test to a gender claim); Gordon v. United Airlines, Inc., 246 F.3d 878, 885-86 (7th Cir. 2001) (applying the test to race and age claims). If Nwangwa sets forth evidence demonstrating a prima facie case of discrimination, FedEx must introduce a legitimate, non-discriminatory reason for terminating him. See Grayson, 308 F.3d at 818; Mateu-Anderegg, 304 F.3d at 625-26; Gordon, 246 F.3d at 886. The burden then returns to Nwangwa to show that the stated reason is pretext for discrimination. See Grayson, 308 F.3d at 818; Mateu-Anderegg, 304 F.3d at 626; Gordon, 246 F.3d at 886.

The district court did not need to reach the issue of pretext because--as FedEx reiterates on appeal--Nwangwa failed to provide evidence supporting his prima facie case. See Coco v. Elmwood Care, Inc., 128 F.3d 1177, 1178 (7th Cir. 1997). FedEx concedes that Nwangwa belonged to a protected class and suffered an adverse employment action, but argues that Nwangwa cannot meet his burden on the remaining elements of the prima facie case. Nwangwa's brief makes no discernible argument that he has established a prima facie case. He does concede (in his deposition testimony) the facts supporting two performance reminders and thus may not have met FedEx's legitimate expectations. But Nwangwa believes that FedEx applied its legitimate expectations in a disparate manner, and in such circumstances a plaintiff can establish a prima facie case of discrimination by demonstrating that "similarly situated employees were treated more favorably." Grayson, 308 F.3d at 818.

Nwangwa, however, cannot meet this burden. While he did allude in his deposition to three possible employees whom he thinks were treated better than he was, nothing in the record shows that these employees are similarly situated. Nwangwa merely offers his own opinion on these employees' age and disciplinary record, and the record lacks any evidence of their actual race, gender, age, or disciplinary history. Summary judgment was properly granted on these claims.

Nwangwa need not prevail on his race, gender, or age discrimination claims in pursuing his retaliation claim. See Fine v. Ryan Int'l Airlines, 305 F.3d 746, 752 (7th Cir. 2002). On appeal Nwangwa does not make a discernible argument regarding why he should prevail on his retaliation claim; instead, he merely asserts that he received "phony write-ups following on the heels of his complaints." The district court held that Nwangwa failed to prove a causal connection between his protected conduct and the adverse employment action.

In Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640 (7th Cir. 2002), this court recently clarified the proper standard for analyzing retaliation claims at the summary judgment stage. Under the indirect evidence method, a plaintiff must show that after engaging in protected conduct "only he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action even though he was performing his job in a satisfactory manner." Id. at 644. The plaintiff is entitled to summary judgment unless the defendant offers evidence that he did not act with a retaliatory motive. Id. Under this method, establishing a causal link between the protected conduct and adverse employment action is not required.

The district court decided the retaliation claim before

Stone, concluding that Nwangwa failed to meet his prima facie case because he had not established that he engaged in protected activity or that the protected activity caused his termination. As noted earlier, Stone dispenses with the causation requirement. It is clear on this record that Nwangwa cannot show that similarly situated employees were treated more favorably. He alludes to similarly situated managers, but he failed to demonstrate that these similarly situated employees were not disciplined for misconduct similar to his. Because Nwangwa cannot establish a prima facie case of retaliation, summary judgment was properly entered.

AFFIRMED.

No. 00 C 3709

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

ISHMAEL NWANGWA,
Plaintiff,

vs.

FEDERAL EXPRESS CORPORATION,
Defendant.

December 20, 2001, Decided

COUNSEL:
For ISHMAEL NWANGWA, plaintiff: William B. Thompson, Attorney at Law, Wheaton, IL.

For FEDERAL EXPRESS CORPORATION, defendant: Martin K. LaPointe, Jay Stephen Dobrutsky, Burke, Warren, MacKay & Serritella, P.C., Chicago, IL.

JUDGES:
CHARLES RONALD NORGLE, SR., Judge, United States District Court.

OPINIONBY:
CHARLES RONALD NORGLE, SR.

OPINION:

OPINION AND ORDER

CHARLES R. NORGLE, SR. District Judge

Before the court is Defendant's motion for summary judgment. For the following reasons, the motion is granted.

I. BACKGROUND n1

Plaintiff, Ishmael Nwangwa, is a Nigerian born male who is over forty years of age. Nwangwa brought this suit alleging that Federal Express Corporation's ("FedEx") termination of his employment violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., 42 U.S.C. § 1981, and the Age Discrimination in Employment Act, 29 U.S.C. § 626, et seq. Specifically, Nwangwa alleged that FedEx discriminated against him on the basis of his race, gender, age, and in retaliation for complaining of discrimination. The court begins with a short discussion of FedEx's discipline policy, and then outlines the facts underlying this suit.

FedEx has a "Performance Improvement Policy" that encompasses progressive levels of discipline to remedy deficient performance. As relevant to this case, FedEx's disciplinary policy calls for verbal and written counseling to identify and correct minor performance issues. When there is a major performance problem, the employee is issued a written "Performance Reminder," which is a detailed disciplinary notice requiring the employee to provide a detailed corrective action plan. Termination will normally result if an employee receives three Performance Reminders within a twelve month period.

Nwangwa began his employment with FedEx in December 1993 as a temporary handler at FedEx's Midway Airport facility. Approximately one month later, FedEx hired Nwangwa as a permanent handler at another Chicago area location. In May 1994, FedEx

promoted Nwangwa to the position of part-time shuttle driver. About a year later, Nwangwa became a part-time courier driver.

During Nwangwa's tenure as a shuttle and courier driver, he entered FedEx's "LEAP" management training program. Nwangwa completed the LEAP program in October 1996, and began applying for operations manager positions at FedEx's Chicago locations. Operations managers have supervisory duties, but are subordinate to a facility's senior manager. Facility senior managers, in turn, are subordinate to managing directors, who supervise a number of facilities in a given area.

On January 1, 1997, FedEx promoted Nwangwa to an operations manager position at its facility in Northbrook, Illinois. During the first few months of Nwangwa's tenure in Northbrook, he received additional management training at FedEx's corporate headquarters in Memphis, Tennessee, and at the Northbrook facility.

In November 1997, James Fruhauf became the Northbrook facility's senior manager, to whom Nwangwa had to report. Beginning in April 1998, Fruhauf issued a series of disciplinary memoranda to Nwangwa, including eight counseling memoranda, and three Performance Reminders.

Fruhauf issued Nwangwa's first Performance Reminder on January 14, 1999. The reason was Nwangwa's failure to report two employee injuries in a timely manner. FedEx policy requires operations managers to immediately enter reports of any employee injuries into FedEx's "INJADD" database. On November 5, 1998, one of the employees under Nwangwa's supervision, Hillary Johnston, suffered a head injury as she got out of her

vehicle. Nwangwa concedes that he failed to enter this injury into INJADD until November 9th. A much lengthier lapse occurred when another employee, Charla Baer, injured her eye in October 1998. Nwangwa did not enter this injury until January 13, 1999. Nwangwa admits as much, but asserts that it was not his responsibility to report Ms. Baer's injury. He claims that the injury occurred during another operation manager's shift, and was that manager's responsibility to report.

At another point in early 1999, the record does not reflect the exact date, Nwangwa alleges that Fruhauf exhibited racial animus towards him. Allegedly, Fruhauf and a couple of other FedEx employees were standing and smoking outside the Northbrook facility. As Nwangwa walked past these employees, Fruhauf allegedly greeted Nwangwa as the "Little Nigerian." According to Nwangwa, Fruhauf then said that Nwangwa did not explain to his drivers the need to keep FedEx vehicles clean. Fruhauf said that he had placed a tub of garbage on Nwangwa's desk to show Nwangwa how things are done here.

Between February and April 1999, Fruhauf allegedly made several remarks that Nwangwa claims exhibit a racial animus: (1) stating that people at 63rd and Green Street in Chicago are easier to understand than Nwangwa; (2) stating that maybe Al Campanis was correct n2; (3) referring to Nwangwa as a "black manager;" and (4) asking Nwangwa during a company meeting if they have pizzas in Nigeria, and what wild animals they use for meatballs.

Fruhauf issued a second Performance Reminder against Nwangwa on April 15, 1999. At that time, Fruhauf accused Nwangwa of having too many open driver positions under his supervision, which led to low

employee morale and productivity. Fruhauf alleged that the vacancies began on February 24, 1999, with the resignation of Robbie Moore. Another vacancy occurred on March 21, 1999 when Steven Flournoy left Nwangwa's work group. A third vacancy appeared on April 1, 1999 when Ed Hamilton was promoted to a dispatch position. In addition to these three vacancies, a fourth position was unfilled due to the disability of Gina Nechi. With scheduling of vacation and sick days, Fruhauf charged that up to 40% of the driver positions under Nwangwa's supervision were vacant. Nwangwa himself was acting as a driver at that time to cover empty routes. During one such instance, Nwangwa missed a pick up from a customer. As of April 15, 1999, only one of these vacancies had been filled, and the status of the others was unsettled. Fruhauf claimed there was a real possibility of the vacancies remaining open until sometime in May of 1999, which Fruhauf charged was too long. Fruhauf issued the second Performance Reminder because Nwangwa did not respond to these vacancies in a timely manner. Nwangwa testified at his deposition that Fruhauf was wrong because there were no driver vacancies on Nwangwa's shifts during this time period.

In June of 1999, Fruhauf and Nwangwa had a confrontation. Nwangwa claims that Fruhauf refused to let Nwangwa be a station representative at a manager's meeting. Fruhauf allegedly said that Nwangwa could go back to his neck of the woods if he didn't like Fruhauf's management. Nwangwa claims that Fruhauf also said that FedEx was no place for affirmative action.

On September 20, 1999, Fruhauf issued the third Performance Reminder to Nwangwa. The basis was that on September 13, 1999, one of Nwangwa's drivers, Jose Lopez, called in to say he would be late for the start of

his shift. Nwangwa advised Lopez that he had to report for work on time, and that any absence would be unexcused. Approximately an hour and fifteen minutes after Lopez's scheduled starting time, Nwangwa learned that Lopez did not show up. Nwangwa went out on Lopez's route, but due to his late start, he missed four customer pick ups, resulting in four dissatisfied customers. Nwangwa admits that this occurred. Because this was Nwangwa's third Performance Reminder within twelve months, Fruhauf terminated Nwangwa.

Nwangwa filed a charge of discrimination with the EEOC on January 21, 2000. He accompanied his charge with a written narrative of alleged discrimination on the part of Fruhauf and FedEx. The EEOC issued a right to sue letter, and this suit followed.

FedEx now moves for summary judgment, arguing that Nwangwa does not have evidence to support his prima facie cases of discrimination. Alternatively, FedEx argues that even if the court were to assume the existence of the prima facie cases, it legitimately terminated Nwangwa for performance deficiencies in accordance with its performance policy. FedEx further asserts that Nwangwa has no evidence that the decision to terminate him was pretext for illegal discrimination. In response, Nwangwa alleges that he has evidence of his prima facie cases and that the decision to terminate him was pretextual. As discussed below, FedEx is entitled to summary judgment.

II. DISCUSSION

A. Standards for summary judgment:

Summary judgment is permissible when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R.

Civ. P. 56(c). The nonmoving party cannot rest on the pleadings alone, but must identify specific facts, see Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316, 1320 (7th Cir. 1993), that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. See Murphy v. ITT Technical Services, Inc., 176 F.3d 934, 936 (7th Cir. 1999); see also Shank v. William R. Hague, Inc., 192 F.3d 675, 682 (7th Cir. 1999) (stating that a party opposing summary judgment must present "what evidence it has that would convince a trier of fact to accept its version of events"). A defendant is entitled to put the plaintiff to his proofs and demand a showing of the evidence. See e.g. Navarro v. Fuji Heavy Industries. Ltd., 117 F.3d 1027, 1030 (7th Cir. 1997). If the plaintiff fails to come up with the required proof, the defendant is entitled to summary judgment. See id. It bears repeating that the plaintiff must present evidence, rather than speculation and conclusions without factual support. See Rand v. CF Industries, Inc., 42 F.3d 1139, 1146-47 (7th Cir. 1994).

In deciding a motion for summary judgment, the court can only consider evidence that would be admissible at trial under the Federal Rules of Evidence. See Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996). The court views the record and all reasonable inferences drawn therefrom in the light most favorable to the party opposing summary judgment. See Fed. R. Civ. P. 56(c); Perdomo v. Browner, 67 F.3d 140, 144 (7th Cir. 1995). "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." See United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962); First Nat'l. Bank of Arizona v. Cities Service Co., 391 U.S. 253, 280, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968); Wolf v. Buss (America) Inc., 77 F.3d 914, 922 (7th Cir. 1996). The choice between reasonable

inferences from facts is a jury function. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

B. Nwangwa's Discrimination Claims:

Nwangwa raises several types of discrimination, including retaliation, race, age, and gender discrimination. The court first addresses Nwangwa's retaliation claim, and then the race, age, and gender claims.

1. Retaliation:

Nwangwa alleges that FedEx violated Title VII by terminating him in retaliation for speaking out against purportedly discriminatory treatment he received from his superiors. (Compl. PP 5, 11.) A retaliation claim exists when: (1) the employee engaged in statutorily protected expression; (2) the employee suffered an adverse action by the employer; and (3) there is a causal link between the protected expression and the adverse action. See Oest v. Illinois Dept. of Corrections, 240 F.3d 605, 615-16 (7th Cir. 2001); Rabinovitz v. Pena, 89 F.3d 482, 488 (7th Cir. 1996). This case is at the summary judgment stage, where Nwangwa bears the burden of presenting evidence of each of these elements, so that the case should be decided by a trier of fact. See Shank, 192 F.3d at 682 (summary judgment is the time for the plaintiff to "put up or shut up"); Navarro, 117 F.3d at 1030 (noting that a defendant moving for summary judgment is entitled to a showing of the plaintiff's evidence). The parties do not dispute that Nwangwa's termination is an adverse employment action. Nwangwa's claim fails, however, because he has no evidence to support the other elements of his claim,

that he spoke out against discriminatory treatment, and that his speaking out caused his termination.

Nwangwa's complaint and memorandum allege in very general terms that Nwangwa complained about discriminatory treatment. These pleadings, however, lack any detail as to what Nwangwa allegedly said during his complaints, to whom he complained, when he complained, how he lodged his complaints, and the context of the complaints. The record lacks evidence of a formal complaint from Nwangwa alleging anything about illegal discrimination during any part of his employment with FedEx. Indeed, Nwangwa admitted during his deposition that he did not file a formal charge of racial discrimination until after he was terminated. Moreover, there is no evidence that any of Nwangwa's purported complaints are tied in any manner to his termination, or even the three Performance Reminders that led to his termination. See e.g. Oest, 240 F.3d 605, at 616 (noting that speculation based on suspicious timing between protected expression and an adverse employment action is insufficient to demonstrate the necessary causal link). With the absence of any substantive evidence of Nwangwa engaging in protected speech and further evidence that the protected speech caused his termination, FedEx is entitled to summary judgment on the retaliation claim. See Frye v. City of Fort Wayne, 241 F.3d 597, 602-03 (7th Cir. 2001) (rejecting a retaliation claim).

2. Race, Age and Gender:

Nwangwa alleges that FedEx's termination of him violated Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and 42 U.S.C. § 1981. Although these statutes provide relief for different types of discrimination, the analysis for each is identical. See Lalvani v. Cook County, Ill., 269 F.3d 785,

789 (7th Cir. 2001) (noting that the prima facie framework for claims under § 1981 and Title VII are the same); Horwitz v. Board of Educ. of Avoca School Dist. 37, 260 F.3d 602, 610 (7th Cir. 2001) (considering an ADEA claim under the analytical framework applicable to Title VII cases). Thus, the court will consider all of the claims together.

Nwangwa can prove his discrimination claims with either direct evidence of discrimination or indirectly through the burden shifting analysis of McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). See Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1088 (7th Cir. 2000) (analyzing the McDonnell-Douglas test in an ADA/age discrimination case). Direct evidence of discrimination is "smoking gun" evidence, which would take the form of "We fired you because of your age/race/gender." See Robin, 200 F.3d at 1088. Because such evidence is rare, a plaintiff can also proceed using indirect evidence of discrimination and the McDonnell-Douglas burden shifting approach. Id.

Under the burden shifting method, a plaintiff raises a presumption of discrimination by proving his prima facie case by a preponderance of the evidence. See id. The prima facie case is: (1) that the plaintiff is within a protected class, such as one based on race, age, or gender; (2) the plaintiff was meeting the employer's legitimate job expectations; (3) the plaintiff suffered an adverse employment action; and (4) that the employer treated more favorably persons outside of the protected class. See Lalvani, 269 F.3d at 789; see also Mills v. Health Care Svc. Corp., 171 F.3d 450, 454-57 (7th Cir. 1999) (discussing the prima facie analysis to be applied to persons not in a group that has been subjected to historical discrimination). The burden then shifts to the

employer to articulate a legitimate non-discriminatory reason for its action. Robin, 200 F.3d at 1088. If the employer does so, the presumption of discrimination disappears, and the plaintiff must prove by a preponderance of the evidence that the employer's stated reasons are a pretext for intentional discrimination. Id. Pretext means a lie. Plair v. E.J. Brach & Sons, Inc., 105 F.3d 343, 348 (7th Cir.1997). Specifically, the plaintiff must demonstrate that the employer's stated reason is phony or completely lacking a factual basis. Paluck v. Gooding Rubber Co., 221 F.3d 1003, 1012-13 (7th Cir. 2000); Jordan v. Summers, 205 F.3d 337, 343 (7th Cir. 2000). As the Seventh Circuit pointed out in Robin, the burden shifting framework is not a rigid analysis, rather it is tool for the court to determine the need for a trial. Robin, 200 F.3d at 1088-89. If a plaintiff does not have direct or indirect evidence that is conclusive in itself, the plaintiff may be able to defeat summary judgment by composing a convincing mosaic of direct and indirect evidence of discrimination. Id.

Here, the parties dispute whether Nwangwa has evidence to support his prima facie cases, but the court finds this case to be more appropriately analyzed under the McDonnell-Douglas approach. The court is not required to analyze the prima facie case. It can assume that a plaintiff has a prima facie case and proceed directly to the question of pretext. See Jackson v. E.J. Brach Corp., 176 F.3d 971, 982 (7th Cir. 1999) (assuming that plaintiff met burden of establishing prima facie case and deciding the matter on pretext issue); Debs v. Northeastern Ill. Univ., 153 F.3d 390, 395 (7th Cir. 1998) (same). Thus, the court assumes, without deciding, that Nwangwa presents his prima facie cases of race, age, and gender discrimination. As discussed below, however, the court finds that FedEx had a legitimate

reason for its actions, and Nwangwa presents no evidence of illegal discrimination.

FedEx presents evidence that it terminated Nwangwa for performance reasons. The record contains the three Performance Reminders Fruhauf issued to Nwangwa, which detail their bases in very specific terms. The first Performance Reminder came on January 14, 1999. The reason was Nwangwa's failure to timely report two employee injuries into FedEx's INJADD database, as required under FedEx policy. The first of these injuries occurred in October of 1998, when FedEx employee Charla Baer injured her eye. Nwangwa did not enter this injury into INJADD until January 13, 1999. The second of these injuries occurred on November 5, 1998, when Hillary Johnston injured her head while exiting her vehicle. Nwangwa failed to report this injury until November 9th.

The second Performance Reminder came on April 15, 1999, as a result of Nwangwa having too many open driver positions under his supervision. The Performance Reminder alleged that three drivers under Nwangwa's supervision, Robbie Moore, Steven Flournoy, and Ed Hamilton had left their positions. A fourth driver, Gina Nechi, was unavailable due to a disability. With additional time off due to vacation and sick days for the drivers that stayed on the job, the vacancies consisted of up to 40% of Nwangwa's work group. Nwangwa admits he acted as a driver to fill vacancies, and during one of these instances, he missed a customer pick up. These vacancies began on February 24, 1999, with Robbie Moore's resignation. As of April 15, 1999, only one of the vacancies was filled, and there was the possibility the other vacancies would remain until sometime in May of 1999. The vacancies resulted in low employee moral, low productivity, and late return of freight.

On September 20, 1999, Fruhauf issued the third Performance Reminder to Nwangwa, resulting in his termination. On September 13, 1999, one of the drivers in Nwangwa's work group, Jose Lopez, called in to say he would be late for the start of his shift. Nwangwa told Lopez to come in on time, but did not do anything else to ensure that Lopez's route would be covered, either by Lopez or another driver. More than an hour after Lopez's scheduled start time, Nwangwa learned that Lopez did not show up, and went out on Lopez's route. Because of Nwangwa's late start, he missed four customer pick ups, resulting in four dissatisfied customers.

Under FedEx's performance policy, the issuance of these three Performance Reminders within a twelve month period is cause for termination. And, each of the Performance Reminders raises legitimate performance issues on the part of Nwangwa that would be cause for termination. That is, if the Performance Reminders are not coverups for discrimination. The court now turns to that issue.

Nwangwa has the burden of demonstrating that these performance issues are a pretext for illegal discrimination. Again, pretext means a lie. Nwangwa must demonstrate that FedEx's performance reminders are phony, completely lacking a factual basis, or otherwise unworthy of belief. See Paluck, 221 F.3d at 1012-13 (pretext can be shown if there is evidence that the defendant does not honestly believe the stated reason for the adverse employment action); Jordan, 205 F.3d at 343 (pretext exists if the stated reason is a lie or is without factual support); Maarouf v. Walker Mfg. Co., 210 F.3d 750, 754 (7th Cir. 2000) (discriminatory animus on the part of the decision maker or one who supplies information to the decision maker may demonstrate pretext if there is no other evidence of the plaintiff's

poor performance). It is not enough to show that FedEx's determination of Nwangwa's performance was poor judgment, mistaken, or even stupid. See Jordan, 205 F.3d at 343; see also Adreani v. First Colonial Bankshares Corp., 154 F.3d 389, 398 (7th Cir. 1998) (analyzing pretext in an ADEA case, noting that the decision-maker's perception is at issue, not the employee's perception); Essex v. UPS, 111 F.3d 1304, 1309 (7th Cir. 1997) (noting that evidence of an unfair or stupid decision by the employer is not evidence that the proffered explanation is a pretext for illegal discrimination); McCoy v. WGN Continental Broad. Co., 957 F.2d 368, 373 (7th Cir.1992) (federal courts do not "sit as a super-personnel department that re-examines an entity's business decisions."). In light of these principles, the court examines Nwangwa's attempts to demonstrate that the Performance Reminders were pretext for illegal discrimination.

As to the first Performance Reminder, Nwangwa admits that he did not enter Hillary Johnston's head injury into the INJADD database for four days, eliminating any issue of pretext as to that fact. Nwangwa asserts that it was not his duty to report Charla Baer's eye injury because that did not occur during his shift, but does not deny that Ms. Baer's injury was not put into the INJADD database for several weeks. Accepting as true that Ms. Baer's injury did not occur during Nwangwa's shift, it evidences at most a mistake on the part of FedEx, not a lie. And, again, to demonstrate pretext, Nwangwa must show that FedEx is lying about the facts. See Paluck, 221 F.3d at 1012-13; Jordan, 205 F.3d at 343. There is no illegal discrimination if FedEx is simply incorrect about the facts. With Nwangwa's admission that these injuries were not timely entered into the INJADD database, there is no evidence that the first Performance Reminder was pretext for illegal discrimination.

As to the second Performance Reminder, the thrust of the issue was FedEx's belief that Nwangwa's work group was operating short-handed, resulting in low employee morale and productivity. Nwangwa's deposition testimony was a flat assertion that there were no driver vacancies in his work group. But, Nwangwa offers no positive evidence of his own to rebut FedEx's version of the facts. Nwangwa does not deny that Robbie Moore, Steven Flournoy, and Ed Hamilton had left their positions, or that Gina Nechi could not work because of a disability. Nor does Nwangwa deny that he performed driver duties himself, and that he missed a customer pick up while doing so. Moreover, Nwangwa does not claim that he filled the positions left open by the departures of Moore, Flournoy, Hamilton, and Nechi. Similarly, Nwangwa offers no evidence to refute FedEx's complaint of low morale and productivity among the employees in Nwangwa's work group as a result of the driver vacancies. All that Nwangwa presents is his own unsupported assertion that there were no driver vacancies in his work group. Noticeably absent from that assertion is any explanation as to how Nwangwa accomplished having no driver vacancies. There is no evidence that he hired drivers, or that Moore, Flournoy, Hamilton and Nechi stayed in their positions. In short, Nwangwa's unsupported claim that there were no vacancies fails to raise a triable question of fact as to whether there were excessive driver vacancies in his work group that resulted in low employee morale and low productivity. See Rand, 42 F.3d at 1146-47; compare Merheb v. Illinois State Toll Hwy. Auth., 267 F.3d 710, 713 (7th Cir. 2001) (noting that a misunderstanding about behavior perceived by co-workers as threatening was insufficient to overcome summary judgment in favor of the defendant).

Concerning the third performance reminder, Nwangwa admits that the facts alleged in the third Performance Reminder are true. This admission eliminates any issue of pretext as to the third Performance Reminder.

Nwangwa attempts to argue that the Performance Reminders are unworthy of belief because their author, Fruhauf, harbors a racially discriminatory animus. This alleged animus is limited to race. Nwangwa makes no attempt to argue that Fruhauf held an animus against males or persons over forty years of age.

When an employer decides to terminate an employee due to poor performance, there is a question of fact about pretext if the decision maker had a racially discriminatory animus, or if the decision maker relied on information supplied by someone with such an animus. See Maarouf, 210 F.3d at 754 (citing Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997)); Hunt v. City of Markham, Ill., 219 F.3d 649, 652-53 (7th Cir. 2000). This is particularly so when the decision maker or source of information for the decision maker expresses discriminatory feelings around the time of, and in reference to, the adverse employment action. See Hunt, 219 F.3d at 652-53. But, if there is corroboration of the employee's poor performance that is independent of any discriminatory animus, then the employee's pretext argument will fail. See Maarouf, 210 F.3d at 754. This independent corroboration can come from persons who do not hold discriminatory beliefs, admissions of employee/plaintiff, or objectively verifiable data. See id. at 754-55.

Nwangwa claims that Fruhauf harbored a discriminatory animus. As evidence, Nwangwa alleges that Fruhauf: (1) referred to Nwangwa on one occasion as the "Little Nigerian;" (2) placed a tub of garbage on

Nwangwa's desk; (3) stated that people at 63rd and Green Street in Chicago are easier to understand than Nwangwa; (4) said that maybe Al Campanis was correct; (5) referred to Nwangwa as a "black manager;" (6) asked Nwangwa during a company meeting if they have pizzas in Nigeria, and what wild animals they use for meatballs; (7) refused to allow Nwangwa to be a station representative at a manager's meeting; (8) said that Nwangwa could go back to his neck of the woods if he didn't like Fruhauf's management; and (9) said that FedEx was no place for affirmative action. Nwangwa argues that these remarks are evidence that Fruhauf harbors a discriminatory animus, and therefore, he is lying about the information contained in the Performance Reminders.

Assuming for the sake of argument that Nwangwa's evidence is sufficient to support an inference that Fruhauf has a racial animus, cf. Logan v. Kautex-Textron North America, 259 F.3d 635, 641 (7th Cir. 2001) (discussing a claim of hostile work environment), there is sufficient independent corroboration of the facts found in the three Performance Reminders to remove any triable issue of pretext. Again, concerning the first and third Performance Reminders, Nwangwa admits that the facts underlying those performance issues are true. Thus, there is no issue of pretext as to those Performance Reminders.

The second Performance Reminder contains specific objectively verifiable information, such as the names of the drivers that left Nwangwa's work group, the dates they left, the reasons they left, and the consequences of the vacancies - namely low employee morale and productivity. FedEx also specifically pointed out that Nwangwa himself had to fill in as a driver, something that Nwangwa does not deny. These are objectively

verifiable facts that exist independent of any allegedly discriminatory animus on the part of Fruhauf. In response to these objective facts, Nwangwa offers an unsupported allegation that there were no driver vacancies in his work group. Nwangwa offers no evidence of his own to contradict, or even cast a shadow over, the facts outlined in the second Performance Reminder. Nwangwa gives nothing but a conclusion, which is insufficient to raise a triable issue of pretext.

The court adds that Nwangwa does not tie Fruhauf's allegedly discriminatory statements to the Performance Reminders, either temporally or substantively. Nwangwa fails to provide dates for any of Fruhauf's allegedly discriminatory remarks, and similarly fails to demonstrate that the substance of the remarks were in any way related to Nwangwa's termination or the Performance Reminders. See e.g. Hunt, 219 F.3d at 652-53 (noting that the plaintiff has the burden to demonstrate that discriminatory remarks are tied temporally or causally to an adverse employment action); cf. Frye, 241 F.3d at 602 (same, in the context of a retaliation claim).

In sum, the court assumes that Nwangwa has his prima facie cases of discrimination based on race, gender and age. FedEx argues that it terminated Nwangwa because of his poor performance, rather than as illegal discrimination. FedEx presents the three Performance Reminders as proof of Nwangwa's poor performance, and the court finds that those Performance Reminders raise legitimate performance issues. Nwangwa fails to present any evidence to support an inference that the Performance Reminders are pretext for illegal discrimination. The facts underlying each of the Performance Reminders are corroborated by independent means, such as Nwangwa's admissions and

the objective nature of the facts, rendering any alleged discriminatory animus on the part of Fruhauf a non-factor.

III. CONCLUSION

For the foregoing reasons, the court grants summary judgment in favor of Defendant. Case terminated.

IT IS SO ORDERED.

ENTER:
CHARLES RONALD NORGLE, SR. Judge
United States District Court

DATED: 12-20-01

Footnotes

n1 The court takes the facts from the parties' Local Rule 56.1 statements and the accompanying exhibits. Disputed facts are noted in the text.

n2 The court takes judicial notice of the fact that Al Campanis was a former general manager of the Los Angeles Dodgers. The court also takes judicial notice that Mr. Campanis left the Dodgers in 1987 after making comments during a television interview that drew criticism for being racially insensitive.

No. 02-1142

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ISHMAEL NWANGWA,
Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellee.

3/3/03

ORDER

On Consideration of the petition for rehearing and rehearing en banc filed by counsel for the Plaintiff-Appellant Ishmael Nwangwa on February 18, 2003, all members of t he original panel have voted to Deny the petition for rehearing. No judge in regular active service requested a vote on the petition for r ehearing en banc.

Accordingly, the petition for rehearing is Denied.

Supreme Court, U.S.
FILED
AUG 1 2003
CLERK

No. 02-1790

IN THE

Supreme Court of the United States

ISHMAEL NWANGWA,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

COLBY S. MORGAN
Attorney for Respondent
3620 Hacks Cross Road
Building B, Third Floor
Memphis, TN 38125
(901) 434-8545

182154

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

The parent company of Respondent Federal Express Corporation is FedEx Corporation. Respondent is a wholly-owned subsidiary of FedEx Corporation. FedEx Corporation is publicly traded.

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STATEMENT OF THE CASE

Petitioner's employment as an operations manager for Respondent was marked by ongoing performance deficiencies that ultimately led to his termination pursuant to the Performance Improvement Policy. This policy applied to all employees, including Petitioner. The policy prescribed progressive discipline for continuing performance deficiencies. A written performance reminder was the next step after counseling when an employee continued to exhibit performance problems. If an employee repeatedly failed to improve his performance, termination normally resulted with the issuance of three performance reminders within a twelve-month period. This is precisely what happened to Petitioner.

In April 1998, Petitioner transmitted a personal email intended for a female employee, but inadvertently "broadcast" the email to other employees. The email said that Petitioner "loved" the employee, and he admitted he had pictures of her in his office. His manager issued Petitioner a counseling memorandum for this violation of the Acceptable Conduct Policy. Petitioner conceded a more serious warning letter could have been issued to him.

In the ensuing months, Respondent issued seven more counseling memoranda to Petitioner in an attempt to correct various performance deficiencies. Specifically, Respondent counseled Petitioner for: (1) failing to timely submit his workgroup time cards; (2) obtaining poor leadership scores from his workgroup on his Survey Feedback Action evaluation; (3) leaving packages on rollers at the station; (4) failing to timely enter data for his workgroup into the computer; (5) failing to properly communicate with his employees; (6) failing to timely enter reports on workplace injuries into the computer system; and (7) failing to disclose a personal traffic ticket.

Petitioner's performance did not improve. On January 14, 1999, Respondent issued Petitioner his first performance reminder under the Performance Improvement Policy for failure to timely report two workplace injuries according to policy. Petitioner did not appeal the reminder through Respondent's internal grievance process, the Guaranteed Fair Treatment Procedure ("GFTP"). On February 11, 1999, Respondent issued Petitioner another counseling memorandum, this time for failing to timely conduct road tests for his employees. Petitioner admits that he had no concerns about this counseling memorandum.

Respondent issued Petitioner a second performance reminder on April 15, 1999 for his failure to plan and organize his employees' route assignments. More specifically, Petitioner failed to take proper steps to insure he had sufficient couriers running all the assigned routes of his workgroup, sometimes leaving up to seven vacant routes (40% of workgroup). This detrimentally impacted station staffing, and the ability to move freight on a timely basis in Respondent's time-sensitive system.

On April 19, 1999, Petitioner prepared a written action plan committing to improve his performance as a manager. He admitted in the plan that "[o]bviously, there is room for improvement." He supplemented the action plan on April 26, 1999, pledging his "commitment to work this plan" and "get organized more." Nevertheless, he filed a grievance regarding his second performance reminder. The discipline was upheld at Step 1, and Petitioner voluntarily chose not to pursue Steps 2 and 3 of the GFTP.

Respondent issued Petitioner another counseling memorandum on June 15, 1999 regarding packages left at its Northbrook, Illinois facility. On July 9, 1999, another employee

complained that Petitioner had attempted to arrange the employee's marriage to one of Petitioner's daughters in exchange for money. Petitioner was suspended with pay pending investigation of this bizarre circumstance. Respondent issued Petitioner a discussion memorandum regarding this incident on July 13, 1999.

Yet Petitioner's performance deficiencies persisted. On September 16, 1999, Respondent issued Petitioner another counseling memorandum regarding more packages left at the Northbrook facility. About this time, one of Petitioner's employees failed to report to work causing his route to remain uncovered, and resulting in several missed customer pickups. Petitioner first blamed the dispatcher, but finally acknowledged his ultimate responsibility as manager. On September 20, 1999, Respondent issued Petitioner a performance reminder for this incident. As a result of this third performance reminder within a twelve-month period, Petitioner's employment was terminated according to policy. He appealed his termination through the GFTP, but the termination was upheld at each of the three steps.

Petitioner admitted that his manager had counseled him many times about planning and organization prior to the events leading to his termination. He conceded that he had made mistakes as a manager. Conversely, Petitioner proffered no probative evidence of retaliation, race, gender, or age discrimination. As to race discrimination, he admitted that all the alleged isolated incidents supporting this claim were contained in a memorandum attached to his original complaint. He further admitted he prepared the memorandum off the top of his head, without referring to any notes, over four months after his termination. He admitted he did not raise most of the issues during his employment. As to the

others, he could not recall any details that would explain how he brought them to the attention of management. In the documentation supporting the GFTP grievance of his termination, Petitioner did not discuss any of these incidents. He did not complain about them in his internal EEO complaint form. Most importantly, he did not offer any evidence connecting the alleged incidents to the facts surrounding his progressive discipline and final termination. Nor did he identify any similarly situated comparators.

REASONS FOR DENYING THE PETITION

THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER DID NOT PRESENT EVIDENCE OF RETALIATION OR UNLAWFUL DISCRIMINATION

The Court of Appeals for the Seventh Circuit correctly concluded that Petitioner did not present direct evidence of discrimination based on race, gender or age, and therefore was required to proceed under the indirect evidence/shifting burdens method. *Grayson v. O'Neill*, 308 F.3d 808 (7th Cir. 2002) (race claim); *Mateu-Anderegg v. Sch. Dist. of Whitefish Bay*, 304 F.3d 618 (7th Cir. 2002) (gender claim); *Gordon v. United Airlines*, Inc., 246 F.3d 878 (7th Cir. 2001) (race and age claims). Petitioner failed to provide evidence supporting his *prima facie* case under the indirect proof method. He conceded the facts supporting two performance reminders, and offered no evidence to rebut the facts underlying the third performance reminder and termination. Thus, he was not meeting Respondent's legitimate business expectations.

As to his retaliation claim, the Court of Appeals correctly found that Petitioner did not make a discernible argument regarding why he should prevail. He provided no causal connection between his alleged protected conduct and adverse employment action. Moreover, he did not show that similarly situated employees were treated more favorably.

Petitioner relies in his petition exclusively on *Lujan, Secretary of the Interior, et al. v. National Wildlife Federation, et al.*, 497 U.S. 871 (1990). However, this reliance is misplaced. The Supreme Court noted in *Lujan* that ". . . the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Id.* at 888-889. The Court determined that the non-moving party's averments did not satisfy Rule 56 because of their omission of material facts:

> It will not do to "presume" the missing facts because without them the affidavits would not establish the injury that they generally allege. That converts the operation of Rule 56 to a circular promenade: plaintiff's complaint makes general allegation of injury; defendant contests through Rule 56 existence of specific facts to support injury; plaintiff responds with affidavit containing general allegation of injury, which must be deemed to constitute averment of requisite specific facts since otherwise allegation of injury would be unsupported (which is precisely what the defendant claims it is).

Id. at 889.

Petitioner makes the same mistake that the non-moving party made in *Lujan*. His sworn "averments" are so devoid of factual specificity, so lacking in probative value, and so unconnected to the alleged adverse employment action, as to be of no consequence in the disposition of the case. For practical purposes they do nothing more than recite the contents of his pleading. Petitioner's averments never attempt to contradict the operative facts that chronicle the reasons for his termination as developed in the proof. Petitioner averred nothing to contradict the legitimate business reasons for the issuance of the three performance reminders that necessitated his termination according to company policy. As such, Petitioner's averments perpetrate the red herring fallacy by missing the central point — that Defendant's actions in disciplining and terminating Petitioner were lawful and non-discriminatory, and Petitioner has presented no countervailing evidence of this fact.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

COLBY S. MORGAN
Attorney for Respondent
3620 Hacks Cross Road
Building B, Third Floor
Memphis, TN 38125
(901) 434-8545